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# Private Law: Persons

Katherine Shaw Spaht

# PERSONS

*Katherine Shaw Spaht**

## ALIMONY AFTER DIVORCE**

### *For the Wife—Constitutionality*

During the past year, the Louisiana Supreme Court considered and upheld the constitutionality of article 160 of the Civil Code,[1] yet the ultimate rationale for this holding remains

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* Associate Professor of Law, Louisiana State University.

** A case which may have a practical impact on alimony after divorce is *Holliday v. Holliday*, 358 So. 2d 618 (La. 1978). Although the issue involved alimony pending suit under article 148 of the Civil Code, language in the decision may indicate the opinion of the court on a waiver of alimony after divorce contained in a prenuptial contract. The court held that a waiver of alimony pending suit contained in a prenuptial contract was null as against public policy. *See* LA. CIV. CODE art. 11. According to the court, articles 119 and 120 express the public policy of the state as to personal obligations of the spouses contracted with marriage, with article 148 providing the enforcement for these provisions. Futhermore, "[t]he policy involved is that conditions which affect entitlement to alimony pendente lite cannot be accurately foreseen at the time antenuptial agreements are entered, and the public interest in enforcement of the legal obligation to support overrides the premarital anticipatory waiver of alimony." 358 So. 2d at 620. For an analysis of the *Holliday* decision, see the upcoming Note in Issue 4 of 39 LA. L. REV. (1979).

1. LA. CIV. CODE art. 160 provides:

> When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income when:
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> 1. The wife obtains a divorce;
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> 2. The husband obtains a divorce on the ground that he and his wife have been living separate and apart, or on the ground that there has been no reconciliation between the spouses after a judgment of separation from bed and board, for a specified period of time; or
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> 3. The husband obtained a valid divorce from his wife in a court of another state or country which had no jurisdiction over her person. This alimony shall be revoked if it becomes unnecessary, and terminates if the wife remarries.

The constitutionality of Civil Code article 160 has previously been considered in *Whitt v. Vauthier*, 316 So. 2d 202 (La. App. 4th Cir.), *cert. denied*, 320 So. 2d 558 (La. 1975). *Whitt* was commented upon in *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Persons*, 37 LA. L. REV. 305 (1977). Interestingly enough, the alternate rationale of *Whitt*, similar to that of the majority of the supreme court in *Loyacano v. Loyacano*, 358 So. 2d 304 (La. 1978), on original hearing, was referred to in *Orr v. Orr*, 351 So. 2d 906 (Ala. 1977). For a discussion of the United States Supreme Court's decision in *Orr v. Orr*, see text at notes 14-19, *infra*.

somewhat unclear. As a defense to the wife's claim for alimony, the husband in *Loyacano v. Loyacano*[2] urged the unconstitutionality of article 160.[3] On original hearing, the court held that article 160 was constitutional because the husband was entitled to claim alimony after divorce under the same circumstances as the wife.

According to Justice Dennis, if article 160 were interpreted to allow only wives to collect alimony, the statute would contain an arbitrary and unreasonable classification.[4] Although article 160 does not specifically authorize an award of alimony for husbands, Louisiana is a "civil law jurisdiction" and "the absence of express law does not imply a lack of authority for courts to provide relief."[5] Justice Dennis reached the conclusion that the positive law was silent regarding alimony for husbands by examining the legislative expressions and by extensive exegesis.[6] Thus, since the positive law is silent "the judge is bound to proceed and decide according to equity."[7] Examining the general policy consideration underlying article 160,[8]

2. 358 So. 2d 304 (La. 1978).

3. The husband claimed that article 160 of the Civil Code constituted a denial of equal protection of the laws to males under the fourteenth amendment to the United States Constitution and article I, section 3, of the Louisiana Constitution of 1974.

4. According to Justice Dennis, "[S]uch classifications for purposes of entitlement to alimony after divorce probably were founded on the assumption that all former husbands have sufficient means for their support, or that few divorced women have property and earnings out of which alimony could be paid, or upon both." 358 So. 2d at 307. Futhermore, he added: "If these propositions were ever true, common experience tells us that the deviations from them are now too numerous for the classifications to withstand equal protection challenge." *Id.*

5. *Id.*

6. *Id.* at 308. The court stated:

> Civilian judges may perform extensive exegesis to discover the original legislative intent; legislative texts may be interpreted so as to give them an application that is consistent with the contemporary conditions they are called upon to regulate; and a particular conflict of interests before the court may be resolved in accordance with the general policy considerations which induced legislative action rather than by reliance on logical deductions from the language of the text.

*Id.*

7. *Id. See* LA. CIV. CODE art. 21.

8. The court stated: "The general policy consideration and practical reason which appear to have induced the legislature to provide alimony after divorce was to prevent divorced women without sufficient means from becoming wards of the state."

Justice Dennis opined that the purpose of this socio-economic legislation would also be served by granting support to either spouse.

However, on rehearing, the majority of Justices held that article 160 was constitutional but divided as to the proper rationale. Three of the Justices[9] held that even though article 160 "does not provide alimony to a needy husband, it is, nonetheless constitutional."[10] The rationale was that "[s]tatutes elsewhere allowing alimony only to wives have withstood the equal protection argument . . . . [I]t is not within the province of this Court to evaluate the legislative policy embodied in the statute."[11] Three other Justices concurred,[12] two for the reasons expressed on original hearing. Justice Calogero, in dissent, was of the opinion that article 160 was unconstitutional: "In this case, I would invalidate Article 160 because of its gender-based discrimination but I would not usurp the legislative function by grafting onto our law a constitutionally permissible alimony provision."[13]

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358 So. 2d at 308. Furthermore, the court relied on the debates of the Louisiana Constitutional Convention in 1973, stating:

> The evolving nature of the role played by women in our state was clearly and emphatically recognized by the provision banning invidious gender based discrimination in the Louisiana Constitution of 1974. Indeed, the debates at the 1973 Louisiana Constitutional Convention concerning the provision reflect that the delegates considered alimony to be an important statutory right and contemplated that the new equal protection clause would require that it be granted equally to both sexes. Consequently, when we attribute to article 160 the meaning that a present day legislator would have attributed to it, we must assume that he would have taken cognizance of the increasing and expanding nature of women's activities and responsibilities, as well as our constitution's prohibition of arbitrary or unreasonable gender based legal classifications, and that he would not have intended by the legislation to discriminate against husbands who have not sufficient means for their maintenance by declaring them ineligible for alimony after divorce.

*Id.* at 309.

9. Chief Justice Sanders and Justices Summers and Marcus.

10. 358 So. 2d at 314.

11. *Id.* at 316. "Modification addresses itself to the legislature." *Id.* In fact, at the 1978 Regular Session of the Louisiana Legislature Senator Hudson introduced Senate Bill No. 573, which would have permitted courts to award alimony to husbands if they were in need and not at fault. Although the bill passed the Senate, it received an unfavorable report from the House Committee on Civil Law and Procedure.

12. Justices Dennis, Tate, and Dixon.

13. 358 So. 2d at 317 (Calogero, J., dissenting).

Despite the conflicting rationales of *Loyacano*,[14] some direction was given by the United States Supreme Court in *Orr v. Orr*.[15] In that case a similar Alabama alimony statute was declared unconstitutional. On the merits, the Court held that the alimony statute imposing an obligation upon men only was discriminatory and thus prohibited by the equal protection clause of the fourteenth amendment. The state objectives urged as justification for the gender-based classification were "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role,"[16] provision for a needy spouse "using sex as a proxy for need,"[17] and compensation for past discrimination against women during marriage. According to Justice Brennan, none of the objectives advanced were sufficient to justify Alabama's statute, especially when compared to a gender-neutral law which would place the obligation on the spouse able to pay. In fact, the Court noted what it considered to be the perverse effects of the statute, that is favoring only the financially secure wife whose husband is in need. In reversing the judgment and remanding to the Alabama court, Justice Brennan opined that the statute could be "validated by . . . amendments which either (1) permit awards to husbands as well as wives, or (2) deny alimony to both parties."[18] Subsequently, the United States Supreme Court vacated the judgment in *Loyacano* and remanded the

14. In his concurring opinion, Justice Dennis recognized the confusion which will result from the court's decision:

> It should be noted that our various opinions today leave the status of Civil Code Article 160 in a state of considerable doubt. Three members of the Court are of the opinion that the article is constitutional and does not deny equal protection of the laws although it discriminates on the basis of sex in granting an important statutory right. Three other members of the Court are of the opinion that if the article were to be interpreted to deny alimony to one sex that it would be unconstitutional, but that it does not contain such a prohibition; and that, since there is other authority in the civil code for granting alimony rights to both sexes, Article 160 does not deny equal protection of the laws. One member of the court is of the view that Article 160 is unconstitutional.

358 So. 2d at 317.

15. 99 S. Ct. 1102 (1979).

16. *Id.* at 1111.

17. *Id.*

18. *Id.* at 1108.

case to the Louisiana Supreme Court for further consideration in light of the *Orr* decision.[19]

*Not at Fault*

Only "[w]hen the wife has not been at fault" may she seek alimony after divorce under the provisions of article 160 of the Civil Code. Consistently, the jurisprudence has defined "fault" as a serious, "independent contributory or proximate cause of the separation rather than a justifiable or natural response to initial fault on the part of the husband."[20] Although seemingly a definition not difficult to apply, the courts have encountered problems in its application when the divorce was preceded by a judgment of separation from bed and board.

After inconsistent courts of appeal decisions, the supreme court in *Fulmer v. Fulmer*[21] resolved the dilemma of the effect of a prior separation judgment on the issue of fault for alimony purposes. Although not res judicata on the issue of fault,[22] the judgment of separation would be determinative of the fault issue and preclude its relitigation. Justice Tate, by examining the statutory history of article 160, concluded that it was the intent of the legislature to prohibit relitigation of fault for alimony purposes where there has been a prior judgment of separation from bed and board, at least when the grounds for divorce were non-reconciliation for the statutory period after separation.[23] The legislative choice, Tate assumed, is based upon two policies—judicial economy and "consistency represented by having the separation-causing fault determined once and in the separation proceeding itself, rather than litigating (or relitigating) it in the much later divorce proceeding—where, with different testimony or less recent recollection, the separation-

19. 99 S. Ct. 1488 (1979).

20. Adler v. Adler, 239 So. 2d 494, 496 (La. App. 4th Cir.), *cert. denied*, 257 La. 168, 241 So. 2d 530 (1970), and cases cited therein.

21. 301 So. 2d 622 (La. 1974).

22. *Id.* at 625. *See* LA. CIV. CODE art. 2286, which reads:

> The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

23. LA. R.S. 9:302 (1950), *as amended by* 1977 La. Acts, No. 702, § 1.

causing fault might even be determined contrary to that determined at an earlier well-tried and hotly-contested separation adjudication."[24] Despite the articulated policy underlying article 160, Tate stated: "[T]he judicial determination is conclusive whether . . . determined after a *contested hearing or* . . . *upon confirmation of a judgment by default.*"[25]

Carefully developing the rationale of *Fulmer* by statutory interpretation of article 160, Justice Tate did not rely upon application of the doctrine of collateral estoppel (estoppel by judgment).[26] The reason becomes obvious after *Welch v. Crown Zellerbach Corp.*,[27] in which the court held that collateral estoppel was "[n]ot susceptible of orderly application in a [civil law] jurisdiction."[28] In *Welch* the court concluded that to recognize and apply the doctrine of collateral estoppel would effectuate a fundamental change in policy from that expressed by the legislature in article 2286 of the Civil Code,[29] which reflects the belief that "[t]he inconvenience caused by relitigation is outweighed by the injustice of perpetuating erroneous judicial decisions."[30]

The effect, if any, of *Welch* upon *Fulmer*, is obviously not direct because of Justice Tate's rationale in *Fulmer*. Yet, if there is a factual situation involving a prior judgment of separation which does not fall within the policy articulated in *Fulmer* underlying article 160, it follows that the more general policy of article 2286, as articulated in *Welch*, must govern. In *Fulmer* the articulated policy underlying the legislative choice made in article 160 referred to consistency in judgments where

24. 301 So. 2d at 625.

25. *Id.* at 628-29 (emphasis added).

26. Collateral estoppel was defined by the court in *Welch v. Crown Zellerbach Corp.*, 359 So. 2d 154 (La. 1978), as a doctrine of issue preclusion which prevents a relitigation of issues actually decided in a prior suit between the parties on a different cause of action. *See* Mitchell v. Bertolla, 340 So. 2d 287 (La. 1976), and cases cited therein.

27. 359 So. 2d 154 (La. 1978), discussed in this Symposium at page 914.

28. *Id.* at 157. The reason expressed by the court for the inability to apply collateral estoppel in Louisiana, a civil law jurisdiction, is "[b]ecause of a basic difference between the meanings ascribed to the common law form 'cause of action' and the civil law 'cause' in res judicata . . . ." *Id.*

29. See note 22, *supra*, for the text of article 2286.

30. 359 So. 2d 154, 157 (La. 1978).

different testimony and less recent recollections result in different judgments than that in a *hotly contested* separation judgment. Although the court in *Fulmer* concluded in dicta that the same result should obtain if the separation judgment was by default, it is doubtful that such a conclusion can be maintained after *Welch*. Unfortunately, the policy enunciated in *Fulmer* did not incorporate a consideration of the defendant's *opportunity to litigate* the issue of fault. For, in many cases, the spouses are amenable to severing the marital relationship by a default separation judgment, but unwilling to pay for it in the form of alimony after divorce. Until the court has the opportunity to clarify the policy of article 160 in light of *Welch*, including some notion of "opportunity" to litigate the issue of fault, it is arguable that *Fulmer* should not apply when the separation judgment is obtained by default.

Preoccupation with fault originates with the French counterpart to article 160.[31] As explained by Planiol,[32] fault as an issue for the award of alimony finds its basis in the principle that whatever act of man that causes damage to another obliges him by whose fault it happened to repair it.[33] Properly characterized, alimony historically was an indemnity. However, as Justice Dennis observed,[34] article 160 does not necessarily reflect such a view for the husband need not be proven at fault. Elimination of the preoccupation with fault during the separation proceedings could be accomplished simply by providing a ground for separation based on living separate and apart for thirty days, as this author has previously urged.[35] The

31. Code Napoleon art. 301 (1804).

32. 1 M. PLANIOL, CIVIL LAW TREATISE, pt. 1, no. 1259 at 696-97 1259 (La. St. L. Inst. trans. 1959). Planiol states:

> The community of life permitted the spouse without means to share the welfare of the other. Suddenly through no fault of the spouse in question, he or she finds himself or herself devoid of resources and plunged into poverty. It is manifestly in such a case as this that the guilty party should be made to bear the consequences of his wrong act.

*Id.*

33. LA. CIV. CODE art. 2315.

34. Loyacano v. Loyacano, 358 So. 2d at 308-09 n.12.

35. *See The Work of the Louisiana Appellate Court for the 1973-1974 Term—Persons*, 35 LA. L. REV. 259, 265 (1975). Another expression in accord with this view is Judge Lemmon's statement in *Dixon v. Dixon*, 357 So. 2d 856, 858 n.2 (La. App.

legislature took the first step in this direction in 1977 by adding a ground for separation based upon living separate and apart for six months when affidavits are executed by both spouses attesting that irreconcilable differences exist such as render the common life together insupportable.[36] Another alternative for eliminating the preoccupation with fault is to remove fault entirely from alimony considerations under article 160, as the French have effectively done.[37]

To the extent that *Fulmer* remains unaffected by *Welch*, its extensive dicta has been applied in numerous intermediate court decisions.[38] One of the more difficult questions posed by application of *Fulmer* is what effect, if any, does the husband's post-separation fault have on the issue of the wife's right to claim alimony. In *Bruner v. Bruner*[39] the husband had obtained a judgment of separation from the wife on the ground of habitual intemperance; subsequently, the wife sought a divorce on the ground of adultery. When the wife claimed alimony, she argued that *Fulmer* did not apply "where a divorce is sought for post-separation fault such as adultery."[40] The Second Cir-

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4th Cir. 1978), where he stated:

> It is indeed unfortunate that a spouse, who is separated because of incompatibility, must file a suit alleging fault in order to maintain an ancillary action for support, since such a suit seriously impairs any chances for reconciliation. Furthermore, present jurisprudence makes a default judgment of separation an absolute bar to subsequent litigation of fault, if alimony is sought after divorce. Thus, when one spouse is required to allege fault in order to obtain support and the other is required to defend the allegations in order to avoid a conclusive judgment on the issue of fault, the needless litigation at the separation level probably eliminates any possibility of separation [sic] thereafter.

In fact, recent courts of appeal decisions indicate that it may be increasingly difficult to obtain a separation under article 138 for fault, if there is a medical explanation for the bizarre behavior, *e.g.*, alcoholism or mental imbalance. *See, e.g.*, Courville v. Courville, 363 So. 2d 954 (La. App. 3d Cir. 1978); Pearce v. Pearce, 344 So. 2d 75, 77 (La. App. 4th Cir. 1977). *See also* Justice Dennis' dissent in Bruner v. Bruner, 364 So. 2d 1015, 1020 (La. 1978) (Dennis, J., dissenting).

36. LA. CIV. CODE art. 138 (10).

37. C. CIV. arts. 278, 280-1, described in Audit, *Recent Revisions of the* FRENCH CIVIL CODE, 38 LA. L. REV. 747, 776 (1978). *See also* Judge Beer's concurring opinion in Rittiner v. Sinclair, No. 9421 (La. App. 4th Cir. Nov. 2, 1978).

38. *See, e.g.*, cases reviewed in *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Persons*, 38 LA. L. REV. 322 (1978).

39. 356 So. 2d 1101 (La. App. 2d Cir.), *aff'd*, 364 So. 2d 1015 (La. 1978).

40. *Id.* at 1105.

cuit Court of Appeal properly concluded that such a statement was dictum and not binding. Relying upon a decision by the First Circuit Court of Appeal in which the same issue was presented,[41] the court denied the wife alimony because of her fault. The wife then argued such a conclusion was an unconstitutional denial of equal protection, because the husband was favored on the effect of post-separation fault. In rejecting the wife's constitutional challenge, the court cited *Loyacano v. Loyacano,*[42] on original hearing, for the proposition that since husbands may now seek alimony the same rules would apply to them.

On appeal,[43] the decision of the Second Circuit was affirmed.[44] Admitting that the argument of the wife was forceful, based upon the language in *Fulmer,* the Louisiana Supreme Court held "that for the wife to be entitled to post-divorce alimony our law requires that she be free from fault both prior to the separation judgment and prior to the divorce."[45] In so concluding, the court cited *Bennett v. Bennett,*[46] *Smith v. Smith*[47] and *Moon v. Moon.*[48] No reference was made to probable legislative intent as evidenced by the legislative history of article 160 so carefully developed in *Fulmer.*

Initially, the court's decision in *Bruner* seems correct because, as Justice Calogero observed, the language of article 160 indicates that only the wife's fault is relevant. Yet, when reexamining the language of *Fulmer,* not only that quoted by the

41. Bennett v. Bennett, 349 So. 2d 909 (La. App. 1st Cir.), *cert. denied,* 351 So. 2d 167 (La. 1977).

42. 358 So. 2d 304 (La. 1978).

43. 364 So. 2d 1015 (La. 1978).

44. On appeal in *Bruner,* Justice Calogero stated:

> The only disparate treatment of husbands and wives is in requiring husbands and not wives to pay post-divorce alimony under article 160. Relator's argument is based on a fallacious premise. She fails to realize that only husbands and not wives are obligated to pay alimony under article 160. She erroneously assumes that an injustice results from requiring the wife to be free from fault both before the separation and before the divorce regardless of the husband's pre-separation or post-separation fault.

*Id.* at 1019.

45. *Id.*

46. 349 So. 2d 909 (La. App. 1st Cir.), *cert. denied,* 351 So. 2d 167 (La. 1977).

47. 216 So. 2d 391 (La. App. 3d Cir. 1968).

48. 345 So. 2d 168 (La. App. 3d Cir. 1977).

wife but also the legislative history of article 160 which Justice Tate concluded entitles the wife to alimony whenever she obtains the divorce on the grounds of the husband's fault,[49] the decision in *Bruner* seems erroneous. In *Moon v. Moon*,[50] involving almost the opposite factual situation, the Third Circuit concluded that post-separation fault of the wife could be introduced to deny her alimony; to do otherwise would be contrary to the policy of encouraging reconciliation which underlies Revised Statutes 9:302.[51] To allow the husband to indiscriminately commit adultery after the separation judgment would not further the policy of section 302 any more than allowing the wife to commit adultery.

Not unlike the issue in *Bruner*, application of *Fulmer* also presents a problem where the separation judgment is based upon the doctrine of comparative rectitude, which compares the fault of the spouses. By its application a spouse, although at fault, may be awarded the separation when he has been guilty of lesser fault than the other. If the judgment of separation is obtained because of mutual fault, article 141 of the Civil Code provides that "permanent alimony shall not be allowed

49. The legislative history of article 160 prior to the 1964 amendment shows the following: "When Article 160 was originally enacted in 1870, only a plaintiff spouse who could prove one of the statutory faults for judicial separation or divorce could obtain a divorce. . . . Article 160 allowed alimony to 'the *wife* who has obtained the divorce,' if she had not sufficient means." 301 So. 2d 622, 625-26 (La. 1974). The court implicitly concluded that the purpose of the 1964 amendment was limited and did not affect interpretation of article 160 when the wife obtains a divorce on grounds of the husband's fault.

50. 345 So. 2d 168 (La. App. 3d Cir.), *cert. denied*, 347 So. 2d 250 (La. 1977).

51. LA. R.S. 9:302 (1950 & Supp. 1977) states:

> When there has been no reconciliation between the spouses for a period of one year or more from the date the judgment of separation from bed and board was signed, either spouse may obtain a judgment of divorce. If an appeal is taken, a suit for divorce may not be commenced until the day after the date upon which the judgment becomes definitive as provided by Article 1842 of the Louisiana Code of Civil Procedure or until the expiration of the time stated in the preceding paragraph, whichever is later. When a judgment of divorce is obtained by the husband against whom the judgment of separation from bed and board was rendered, the wife has the same right to recover alimony as if she had obtained the divorce. The provisions of this Section do not affect in any way the right of the spouse who had obtained the care and custody of the children, as provided by law, to retain such care and custody.

thereafter following divorce."[52] Should *Fulmer* apply where the successful spouse was at fault, yet awarded the separation judgment? Justice Tate, when considering contrary arguments raised in *Fulmer,* mentioned the inherent problems of its application because of the doctrine of comparative rectitude.[53] But in spite of those concerns he concluded that the separation judgment is determinative of the issue of fault for alimony purposes. The implication was that even where the judgment is obtained by applying the doctrine of comparative rectitude the rules of *Fulmer* should apply. Furthermore, the legislative history of article 160 suggests that whenever the wife obtains the judgment of separation on the grounds of the husband's fault, whatever the circumstances, it was the intention of the legislature that she be entitled to alimony.[54] The sole effect of

52. The doctrine of recrimination was also abrogated in divorce suits by the Louisiana Supreme Court in *Thomason v. Thomason,* 355 So. 2d 908 (La. 1978). In footnote eight of the opinion the statement is made that if a divorce is rendered after both spouses are found at fault, no alimony will be awarded under article 160.

In *Brannon v. Brannon,* 362 So. 2d 1164 (La. App. 2d Cir. 1978), the court cited footnote eight in *Thomason* as authority for holding that a wife who obtains a divorce on the ground of adultery is not entitled to alimony if she is guilty of fault. The court in *Brannon,* citing *Thomason,* relied upon the similarities of the facts—in particular, the trial court's adjudication of *mutual* fault. Mutual fault in *Thomason* consisted of the husband's conviction of a felony and the wife's adultery, both of which are grounds for divorce under Civil Code article 139. In *Brannon,* the husband accused the wife of cruel treatment which led to the initial separation, a ground for *separation only* under Civil Code article 138. Based upon a comparison of the grounds in article 138 and article 139, it can be argued that in *Brannon* the faults were not mutual or equal in degree of seriousness. Arguably, the doctrine of comparative rectitude was applied by the trial court in awarding the wife the divorce. *See* text at note 55, *infra.* In addition to the *Thomason* case, the court cited *Smith v. Smith,* 216 So. 2d 391 (La. App. 3d Cir. 1968), a pre-*Fulmer* decision which must be re-evaluated in light of Justice Tate's legislative history of article 160.

53. *Fulmer v. Fulmer,* 301 So. 2d 622, 625 (La. 1974). Justice Tate stated:

> However, we must frankly admit the forcefulness of the contrary arguments, so persuasively set forth in brief in this case and as adopted by the second and third line of decisions.
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> . . . .
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> Also, since under the doctrine of comparative rectitude a wife may be awarded a judicial separation if her husband's fault is greater than her own, a judgment in her favor does not really determine that she is free of fault contributing to the separation.

*Id.*

54. *Id.* at 628. The court stated:

> We thus held [in August v. Blache, 200 La. 1029, 9 So. 2d 402 (1942)] that,

the judgment of separation "is a conclusive adjudication as to which spouse's pre-separation fault *primarily* caused the separation."[55] The same result obtains in a somewhat analogous situation—the application of comparative negligence statutes. The most popular comparative negligence system permits recovery if the plaintiff's negligence was not equal to or greater than that of the defendant.[56] In light of Planiol's expression as to the philosophical source of article 160's concern with fault,[57] the analogy may be apt, and in accord with current notions of comparative fault. Yet, the supreme court decision in *Bruner* indicates that the legislative history of article 160 and the dicta in *Fulmer* may be ignored. Furthermore, under the literal language of article 160, applied in *Bruner,* if the wife is "at fault," most recently interpreted as grounds for separation from bed and board,[58] she will not be entitled to alimony after divorce.

*Without Sufficient Means for Support*

Another element of proof under article 160 is that the wife is "without sufficient means for her support." Support as redefined in *Bernhardt v. Bernhardt*[59] includes, in addition to food, shelter and clothing, "reasonable and necessary transportation or automobile expenses, medical and drug expenses, utilities,

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where the husband held at fault in the separation suit obtains a divorce on the ground of nonreconciliation following the separation judgment, he is precluded from contesting his wife's right to post-divorce alimony, if in need, because of the judgment of separation in her favor based upon her husband's fault. This ruling, based upon the legislative intent of Article 160, is determinative of the present issue, unless the 1964 amendment altered the original intent that the separation decree based upon the husband's fault recognized that any fault of the wife had not caused the separation.

. . . .

Thus, the 1964 amendment was not designed to alter the prior interpretation of article 160 with regard to the wife's entitlement to post-divorce alimony if she had been awarded a judicial separation on the ground of the husband's fault, at least when the final divorce was sought on the statutory ground provided by La. R.S. 9:302.

*Id.*

55. *Id.* at 629.
56. *See, e.g.,* COLO. REV. STAT. § 13-21-111 (1973); WIS. STAT. § 895.045 (1966).
57. *See* note 32, *supra.*
58. Rittiner v. Sinclair, No. 9421 (La. App. 4th Cir. Nov. 2, 1978).
59. 283 So. 2d 226 (La. 1973).

household expenses and the income tax liability generated by alimony payments made to the former wife."[60] All of the wife's assets, her capital and income,[61] but not her earning capacity,[62] are included in a consideration of the wife's "means." Once terms are defined it would seem that practical application would not be difficult. But such has not been the experience.

In *Smith v. Smith*[63] a wife with assets worth $20,000 was held to have sufficient means for her support. To what extent the wife had to deplete those assets before she would be entitled to claim alimony was purposely left unanswered.[64] For twenty-five years *Smith* and its monetary index of $20,000 was relied upon almost exclusively by intermediate courts as the solution to the problems presented by determining when the wife had sufficient means. Then, in *Frederic v. Frederic,*[65] the court introduced a new element into the consideration of whether the wife had sufficient means for her support—the liquidity of her assets.[66]

Utilizing the liquidity language in *Frederic,* the First Circuit attempted to answer in part the question posed by *Smith.* In *Webster v. Webster*[67] and *Bryant v. Bryant,*[68] the court first divided the wife's assets into two categories—liquid and non-liquid. Then the court concluded that the wife must *deplete* her

60. *Id.* at 229.

61. Smith v. Smith, 217 La. 646, 47 So. 2d 32 (1950).

62. Favrot v. Barnes, 339 So. 2d 843 (La. 1976); Ward v. Ward, 339 So. 2d 839 (La. 1976). *See also* LaBeuve v. LaBeuve, 352 So. 2d 749 (La. App. 3d Cir. 1977); Villemarette v. Villemarette, 352 So. 2d 413 (La. App. 3d Cir. 1977); Depner v. Barker, 351 So. 2d 1264 (La. App. 1st Cir. 1977).

63. 217 La. 646, 47 So. 2d 32 (1950).

64. The court stated:

> How far she should go in depleting her capital presents another question. Whilst we do not think that she should be made to use it all, on the other hand, we do not believe that the law intends that she can maintain it intact. . . . To what extent the wife should be made to use up her capital before applying for the alimony is a matter with which we are not concerned at this moment.

*Id.* at 655, 47 So. 2d at 35.

65. 302 So. 2d 903 (La. 1974).

66. *Id.* at 906. "This amount [$20,700] was liquid and is available for her support." *See The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Persons,* 36 LA. L. REV. 339 (1976).

67. 308 So. 2d 302 (La. App. 1st Cir. 1975).

68. 310 So. 2d 648 (La. App. 1st Cir. 1975).

*liquid* assets before she would be entitled to alimony after divorce.[69] The answer given by the First Circuit has proved unsatisfactory, creating problems in determining first what assets were liquid and second to what extent the wife must deplete her non-liquid assets before seeking alimony.

Finally, the supreme court in *Loyacano v. Loyacano*[70] formulated a rule of "reasonableness" when determining when the wife has sufficient means for her support. Rejecting an arbitrary monetary index adopted by courts after *Smith,* Justice Dennis developed a flexible rule which considers all of the factors and other circumstances relevant to the litigation—*i.e.,* "the mental and physical health of the parties, their age and life expectancy, the parties' other financial responsibilities, the relative ability, education and work experience of the parties,[71] and the potential effect of any contemplated depletion of assets upon the children of the marriage."[72] Unquestionably, the decision and formulation of a "rule of reasonableness" reflect a thorough and careful consideration of the difficult questions of when and under what circumstances the wife must deplete her assets before she is entitled to alimony.

In *Boisfontaine v. Boisfontaine*[73] and *Meyer v. Meyer,*[74] the Fourth Circuit Court of Appeal applied *Loyacano's* "rule of reasonableness" in determining in both cases that the wife was entitled to alimony after divorce. Factors enumerated in *Loyacano* and considered by the court were the type of assets, their liquidity, the consequences of liquidating them, and the

69. The court stated:

> We see no reason why she should not be required to deplete the liquid assets she received in the settlement to provide her own food and clothing. . . . The house has provided for the wife's shelter; and the liquid assets *until they are all consumed,* should be used to provide her food and clothing. This, of course, does not prevent her from petitioning the court at a later date *when her liquid assets have been depleted* or upon some other change of circumstances, but until such occurs, she has sufficient means for her own support.

308 So. 2d at 308 (emphasis added).

70. 358 So. 2d 304 (La. 1978).

71. See text at note 62, *supra.* This may be an attempt to reintroduce the notion of *some* consideration of the wife's earning capacity.

72. 358 So. 2d at 311.

73. 357 So. 2d 90 (La. App. 4th Cir. 1978).

74. 357 So. 2d 832 (La. App. 4th Cir. 1978).

respective financial ability of the parties. The trial court in *Boisfontaine* found that the wife did not have sufficient means for her maintenance after considering the nature of her assets[75] reasoning "(1) she should be allowed to use the cash balance [equity from sale of old home] as a down payment on a new house, which was essentially substituting her share of the equity in the family home for equity in a smaller home, and (2) she did not have to sell the furniture, furs and silverware before being entitled to alimony, because she would use the furniture, and the furs and silverware were 'of no great value, perhaps a few thousand dollars worth.' "[76] Approving the rationale of the trial court, the court of appeal added that permitting the wife to use part of the cash to acquire equity in a new home was not unreasonable *"if the new home is purchased at a reasonable cost."*[77]

In *Meyer* the wife contended that she had insufficient means for her maintenance because the community property remained unpartitioned. The husband countered that the wife's share of the unpartitioned community property was worth at least $80,000, based upon his rejected offer to pay her that sum in settlement. The inventory reflected that the principal community asset was one-half interest in a partnership operating as a business enterprise. Considering the nature of the property, "the fact that the property is unpartitioned community property,"[78] and the consequence of its liquidation, the court held the wife presently had no available means with which to purchase the necessities of life. Thus, proceeding cau-

75. The supreme court said:

> Her cash on hand was approximately $200.00. In addition she had $6,636.00 remaining in a homestead account, representing the balance of the proceeds of the community property settlement (in which she received about $17,000.00 and paid $10,000.00 in bills), and she was to receive that week the sum of $25,747.00 as her share of the net proceeds of the sale of the family home. Other assets were corporate stock worth $138.75, an eight-year old automobile valued at $250.00, a promissory note executed by her mother in the amount of $5,000.00, a five-year old fur jacket, a 26-year old fur coat, and certain furniture received in the community property settlement.

357 So. 2d at 91.

76. *Id.* at 91-92.

77. *Id.* at 92.

78. 357 So. 2d 832, 834 (La. App. 4th Cir. 1978).

tiously as Justice Dennis had warned,[79] the court required the husband to pay alimony until the community is settled or until some provision is made to provide support to her through a partial distribution of the property or an advance on the settlement.[80]

79. Justice Dennis stated: "The problem is of such a nature as to be insusceptible of solution by any exact formula or monetary index, and the court should proceed with great caution and due regard for the probable long range effects of any depletion contemplated." Loyacano v. Loyacano, 358 So. 2d 304, 311 (La. 1978).

80. 357 So. 2d 832, 834 (La. App. 4th Cir. 1978).